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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 SAMUEL L. GENSAW III, et al.,

CASE NO.: C-07-3009-TEH

11 Plaintiffs,

**DECLARATION OF WILLIAM F.
MITCHELL AND ATTACHED
EXHIBIT**

12 vs.

13 DEL NORTE COUNTY UNIFIED
SCHOOL DISTRICT, et al.,

DATE: January 8, 2008
TIME: 10:00 a.m.
CTRM: 12, 19th Floor
Honorable Thelton E. Henderson

14 Defendants.
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1 I, WILLIAM F. MITCHELL, declare as follows:

2 1. I am an attorney and partner in the law firm Mitchell, Brisso, Delaney &
3 Vrieze, attorneys for defendants herein.

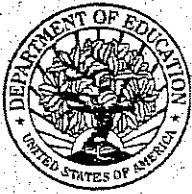
4 2. Attached to this declaration as *Exhibit A* is a true and correct copy of a letter
5 dated April 25, 2006 from the United States Department of Education, Office of Civil
6 Rights, to the Del Norte County Unified School District.

7 3. If called to testify, I could and would competently testify to the above.

8 I declare under penalty of perjury under the laws of the State of California that the
9 foregoing is true and correct. Executed this 29th day of November, 2008, at Eureka,
10 California.

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12 WILLIAM F. MITCHELL
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EXHIBIT A



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
Old Federal Building
50 United Nations Plaza, Room 239
San Francisco, California 94102

April 25, 2006

Ms. Janice C. Moorehouse
Superintendent
Del Norte County Unified School District
301 West Washington Boulevard
Crescent City, California 95531

(In reply, please refer to case no. 09-06-1037.)

Dear Superintendent Moorehouse:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed investigation of the above-referenced complaint filed against the Del Norte County Unified School District. The issue investigated by OCR was whether the District discriminated against sixth through eighth grade students at Margaret Keating School based on national origin (Native American) when it reassigned them to Crescent Middle School in 2005.

OCR enforces Title VI of the Civil Rights Act of 1964 and its implementing regulations. Title VI prohibits discrimination on the basis of race, color or national origin in programs and activities operated by recipients of Federal financial assistance. The District receives funds from the Department and is subject to Title VI and the regulation.

OCR has concluded that the preponderance of the evidence showed non-compliance with Title VI with respect to the District's action. To investigate this complaint, OCR reviewed documentation submitted by the complainant and by the District and data on student enrollment, and interviewed the Complainant and the District Superintendent. The following is a summary of the applicable legal standards, the facts gathered during the investigation and the conclusions in this case.

Under the Title VI regulation at 34 C.F.R. §100.3(a), a school district may not exclude students from participation, deny them benefits, or otherwise subject them to discrimination on the basis of race, color, or national origin with regard to any aspect of its program. Under §100.3(b)(ii), (iii) and (iv) districts may not, on the basis of race, color, or national origin, provide individuals with any service or benefit that is different or provided in a different manner from that provided to others, may not subject individuals to separate treatment, and may not restrict individuals in any way in the enjoyment of any advantage or privilege enjoyed by others.

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To determine whether Native American students were discriminated against on the basis of race under Title VI, OCR looked at whether there was evidence that the students were treated differently than students of other races/national origins under similar circumstances, with respect to the provision of education services, benefits, opportunities. If so, OCR examined whether the District was able to provide nondiscriminatory reasons for its actions and whether there was evidence that the stated reasons were a pretext for discrimination. To find a violation of Title VI and the regulations, the evidence must show that it is more likely than not that the District's actions were based on the students' race/national origin.

Background

In June 2005 the District Board of Trustees voted to re-assign all sixth through eighth grade students from Margaret Keating Elementary School, a K-8 school in the community of Klamath, to a middle school in Crescent City. The Student enrollment at Margaret Keating was, at the time, 67% Native American. The percentage of Native American students at all other elementary schools was 23% or less. In September 2005, OCR received this complaint against the District from a community member representing Native American parents and students, alleging that the Board selected Margaret Keating students, and not students from other schools, to be re-assigned because they are Native American.

After receiving the complaint, OCR learned that the same complaint had been filed with the District through its internal complaint process. Under our standard procedures, we closed the OCR complaint pending the outcome of the District investigation, notifying the complainants that a new complaint could be filed with OCR if they believed that the District's process was not adequate. The internal investigation was conducted by a private consultant. The consultant reviewed all available records and documentation, conducted interviews with District representatives and community members, and was extremely thorough. However, the report issued by the consultant on October 17, 2005, was limited to factual findings. Neither the consultant nor the District made a determination on the complainant's allegation that the re-assignment of Margaret Keating students was discriminatory based on national origin. Because of this, the complainants filed a new complaint with OCR and we initiated an investigation into the allegation of discrimination.

Our investigation found the following:

- The District enrolls approximately 4000 students. The District enrollment has been decreasing and the District has been facing financial problems.
- In both 2003 and 2004, the District began to consider closing one or more schools, reassigning students and/or adjusting attendance zones to address

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budget crisis. However, other cost-saving measures were implemented and closures or reassignments took place.

- In September 2004 the District established a "Blue Ribbon Committee" to review the situation and make recommendations on how to address the financial and educational needs of the District. Three subcommittees were formed to examine finance, facilities and programs. The facilities subcommittee studied enrollment patterns and projections, room usage at all elementary schools, and other factors.
- On February 24, 2005, the Committee presented its report to the Board, in which it made recommendations on cost-savings and utilization of the District's schools. The report made the following recommendations:
 - Mountain Elementary School: The report stated that this school was an underutilized facility. It noted that, while closing the facility would realize the greatest savings, the Committee was concerned about the impact of busing young children to other schools. The report concluded that the school should be changed to a K-5 school and students in grades 6-8 could be bused "into town" without any additional expense using existing District transportation.
 - Margaret Keating Elementary School: The report noted that this school was underutilized, had twice as many children as Mountain School, and was equally distant from Crescent City. The report stated that closing the school and busing all the students would "be of concern". The Committee recommended reassigning students in grades 6-8 to Crescent Elk Middle School in Crescent City.
 - Pine Grove Elementary School: The report stated that the largest savings would be realized from closing an "in-town school", i.e. in Crescent City, and recommended closing Pine Grove because of the number of unused classrooms, the percentage of students that were already being bused from Pine Grove from other areas, and its proximity to other schools for which boundary changes were recommended.
 - Boundary changes: The Committee recommended changing the attendance boundaries for two other elementary schools to accommodate the population from Pine Grove.
 - Sixth grade students: It was recommended that sixth grade students from Pine Grove and Mary Peacock be reassigned to Crescent Elk Middle School.
- Enrollment data reported to the California Department of Education for the 2004-2005 school year showed the following:

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- Mountain Elementary (K-8):
 - Total enrollment: 60
 - Grades 6-8 enrollment :21
 - Native American: 23.3% of total enrollment
 - Margaret Keating (K-8):
 - Total enrollment: 134
 - Grades 6-8 enrollment: 33¹
 - Native American: 67.2% of total enrollment
 - Pine Grove (K-6):
 - Total enrollment 289
 - Grade 6 enrollment: 49
 - Native American: 14.9% of total enrollment.
 - Mary Peacock Elementary (K-6)
 - Total enrollment 421
 - Grade 6 enrollment: 67
 - Native American: 8.8% of Total enrollment
- Both Mountain and Margaret Keating are located approximately 20 miles from Crescent Elk Middle School. Travel distances from home for individual students could be longer or shorter. Pine Grove and Mary Peacock are both located in Crescent City. Reassigned students would not have long distances to travel.
- All the communities affected by the Committee report actively protested the recommended changes. The District administration held meetings with all the communities that could be affected, to discuss parent concerns. The complainant asserted that there was a lack of input from the Klamath community prior to the Board's decision. However, the record showed that public meetings were held in the Klamath area on February 28, April 25 and May 25, 2005.
- Issues raised by the Margaret Keating community included concerns about how the long bus ride to Crescent City would affect the length of the school day for the students, and the available time to study and to participate in tribal activities and events, as well as the difficulty for parents, some of whom who did not have cars, if they needed to go to their child's school or wished to participate in school activities. At some point, it appears that an informal survey of parents and students was conducted concerning the advantages and disadvantages of the change.
- Prior to Board action on the recommendations, the staff and administration of Mountain School submitted suggestions for reducing personnel costs at the school, to avoid the reassignment of students.

¹ The District reported the number at 22 at the end of the 2004-2005 school year.

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- In June 2005, the Board voted to re-assign students in grades 6-8 at Margaret Keating to Crescent Elk Middle for the 2005-06 year. The Board took no action on any other changes recommended by the Committee.
- Although the former Superintendent subsequently stated that the reassignment of Mountain School students would be re-visited the next year, there is nothing in the Board minutes at the time of the decision to re-assign Margaret Keating students that reflects this intention.
- Neither OCR nor the private consultant found any documentation or record prepared prior to the Board's decision that explained why the Board reassigned students from Margaret Keating, but did not implement the other recommendations. There was no discussion of this question in the minutes of the Board meetings that took place between the time of the Committee recommendations and the Board's vote on June 9.
- In July and August 2005 members of the Margaret Keating community made presentations at Board meetings to continue to express their objections to the assignment.
- According to the complainant, during discussions about reassignment of Margaret Keating students, a Board member referred to some community spokespersons as "Yuroks" and stated that Margaret Keating was "not just an Indian school." A Board member also referred to the "tribe" or "tribal members" when identifying some school representatives and said that if the "tribe" could come up with \$60,000 they could keep grades 6-8 at Margaret Keating. The complainant asserted that these references reflected racial bias.
- Students from Margaret Keating began attending Crescent Elk Middle School in September 2005. The District took steps concerning transportation scheduling, curriculum, orientation sessions, and parent meetings to lessen the difficulty of the transition.
- On February 23, 2006, the Board voted to transfer grades 6-8 from Mountain School to Crescent Elk.
- The District provided OCR with written statements by Board members that were prepared in response to the consultant's investigation, and a chronology developed for OCR by the Superintendent, describing the reasons for the June 2005 decision to reassign only the Margaret Keating students. OCR's understanding of the District's reasons is as follows:

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1. A majority of parents and students at Margaret Keating supported the move. The surveys conducted at Margaret Keating showed this. The District provided several messages from supportive parents.
 2. Students would receive a better education, have access to more curriculum offerings and competitive sports, and be better prepared for high school if they attended a middle school rather than remaining in the combined 6-8 classroom at Margaret Keating.
 3. There would be financial savings by the elimination of a teaching position. The District could not financially support the combined 6-8 classroom at Margaret Keating with so few students.
 4. More notice of possible reassignment was provided to the community at Margaret Keating since District officials began discussing reassignment of students from Margaret Keating in 2003.
 5. Mountain School is a new campus that was rebuilt after a fire in 2003.
 6. Mountain School staff proposed cost reductions at that school.
- Other evidence relevant to the stated reasons showed the following:
 1. Parents and other members of the Klamath community dispute the assertion that most supported the decision. There is also a record of numerous protests from the Margaret Keating community at Board and community meetings. The informal survey at Margaret Keating showed parents and students identifying an approximately equal number of advantages and disadvantages.
 2. While the educational benefits seem apparent, this is equally applicable to both Margaret Keating and Mountain. Both schools had one teacher teach grades 6-8 in a combined classroom. The existence of educational benefits for Margaret Keating students does not explain the selection of one school but not another that would have experienced similar benefits.
 3. Budgetary constraints can be a legitimate, non-discriminatory reason for closing and/or consolidating schools. Money was saved by the elimination of a teaching position at Margaret Keating. However, the other reassignment recommended by the Committee would also have produced financial savings. There was no evidence in the Committee report indicating that a greater savings would be realized from reassigning Margaret Keating students than the reassignment of Mountain students, and the District's financial problems were not eliminated by the reassignment of Margaret Keating students.
 4. The fact that notice of possible reassignment was given to the Margaret Keating community earlier than it was given to other schools arguably made the decision less disruptive but again does not explain why only Margaret Keating school was selected for action.
 5. Although Mountain School was a newer, rebuilt facility, this would have been relevant if closure of that school had been proposed. However, the school was not proposed for closure. Since the only question was moving,

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student from the upper grades, the newer condition of the facility is directly relevant.

6. The Board did not officially request suggestions from all the schools potentially affected and provide notice that its decision would be based on response. Therefore, the fact that Mountain School staff made its suggestions for budget cuts but Margaret Keating staff did not, is no sufficient basis to explain difference in treatment of the two schools.

Conclusion

The evidence shows that students from four District schools were considered for assignment to address District financial problems under the Blue Ribbon Committee February 2005 recommendations. The only students selected by the Board of Trustees to be reassigned to another school were students from Margaret Keating School. The evidence showed that, in reassigning students from Margaret Keating to a new school miles and approximately 30 minutes away while not reassigning students from the other identified schools, the District treated the predominately Native American school differently than schools with predominantly white populations. OCR therefore examined the reasons stated by the District for the different treatment, and whether there was evidence to establish that the decision was based on legitimate educational and operational reasons and not on national origin.

Preliminarily, as part of the evidence presented to show racial bias, witnesses in support of the complaint described instances of references by a Board member to "Yuroks" and to "the tribe". The evidence showed that, while these terms may have been used, they were not used in a racially derogatory manner or context. Therefore OCR could not infer racial hostility or overt bias in the Board's decision because of the use of the terms.

The reasons for the decision provided to OCR by the District are described above. OCR concluded that there was insufficient evidence to substantiate the stated reasons. First, the Board decision was inconsistent with the recommendations made by its Blue Ribbon Committee. Also, neither OCR nor the District consultant found any record prior to contemporaneous with the Board decision that articulated the reasons for the decision. The reasons discussed above were articulated subsequent to the Board's decision and after the OCR complaint was filed, raising questions as to whether they were in fact the basis for the decision at the time the decision was made. Further, in reviewing each of the specific reasons provided by the District, OCR found that they were not factually supported by the evidence.

School closures and student reassignment are difficult, sensitive and contentious issues for students, parents, staff and administrators in any school. OCR's role is not to determine whether the June 2005 decision to reassign the Margaret Keating students was appropriate or sound. OCR's role is to determine whether the preponderance

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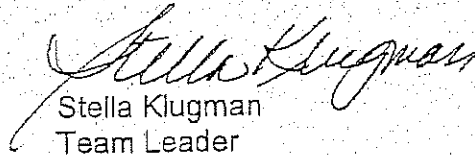
the evidence showed that the decision was made for nondiscriminatory reasons. OCR concluded there was not sufficient evidence to establish that the decision was made for reasons other than national origin. Therefore, OCR found that the District did comply with Title VI and the regulation.

In determining a remedy for noncompliance under Title VI, OCR asks school districts to take steps to ensure equal treatment of students without regard to race or national origin. As noted above, prior to the conclusion of the OCR investigation, the District took action to reassign the Mountain School students in grades 6-8 to Crescent Elk Middle School beginning with fall 2006. OCR has determined there is no basis for requiring additional remedy. As a matter of technical assistance OCR recommends that, in future decisions concerning student reassignment, the District take steps to ensure that its decisions are based on documented nondiscriminatory criteria.

OCR is closing this case as of the date of this letter. The complainants are being notified concurrently.

If you have any questions about this letter, please call Zachary Pelchat, Civil Rights Attorney, at (415) 556-4262.

Sincerely,


Stella Klugman
Team Leader

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Humboldt, over the age of eighteen years and not a party to or interested in the within entitled cause, my business address is 814 Seventh Street, Eureka, California.

On this date, I served the following documents:


DECLARATION OF WILLIAM F. MITCHELL AND ATTACHED EXHIBIT

X By placing a true copy thereof enclosed in a sealed envelope with first class postage thereon fully prepaid for collection and mailing on this date and at the place shown, to the party(ies) and at the address(es) set forth below. I am readily familiar with the practice of this business for collecting and processing documents for mailing. On the same day that documents are placed for collection and mailing, they are deposited in the ordinary course of business with the United States Postal Service at Eureka, California.

By personally delivering a true copy thereof to the party(ies) and at the address(es) as set forth below.

By personally faxing a true copy thereof to the party(ies) and at the facsimile number(s) as set forth below.

I declare under penalty of perjury that the foregoing is true and correct. Executed November 29, 2007, at Eureka, California.


Kathy Radford

Donald W. Brown
COVINGTON & BURLING
Attorneys at Law
One Front Street
San Francisco, CA 94111